authorized to give the advisory opinion. *In re Workmen's Compensation Fund* (1918, N. Y.) 119 N. E. 1027.

The decision is based primarily upon the ground that, under the correct reading of the statute concerned, the Industrial Commission could certify questions of law to the Appellate Division only when they were incidental to a pending controversy with adverse parties litigant. The larger part of the admirably brief and concise opinion of Cardozo, J., is devoted to a review of the authorities and discussions relating to advisory opinions, and follows what may be called the orthodox view, viz., that the legislature cannot, in the absence of express constitutional authority, impose upon the courts the non-judicial function of answering questions of law apart from actual litigation. In justification of this view the opinion says: "The proposed resolution may be valid as to some . . . and invalid as to others. We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait until it arises." The point of view of the common law lawyer has perhaps never been better expressed. Whether this system has given results as excellent as past generations of lawyers would have us believe may be open to question, but that it is our system is beyond dispute. The arguments in favor of calling upon the American judiciary for advisory opinions on constitutional questions, as well as the history of the subject, are fully presented by Professor Albert R. Ellingwood of Colorado College in his recent book, *Departmental Co-operation in State Government*, a review of which will appear in the December issue of the YALE LAW JOURNAL.

HUSBAND AND WIFE—SEPARATION AGREEMENTS—EFFECT OF SUBSEQUENT MISCONDUCT BY WIFE.—A husband and wife agreed to live apart, the husband promising to pay the wife for her support a definite sum weekly. Subsequently the wife committed adultery and the husband refused to make payments falling due thereafter. The wife sued to recover such payments. *Held*, that the misconduct of the wife was a defense to the suit. *Devine v. Devine* (1918, N. J. Ch.) 104 Atl. 370.

On the same facts the English courts permit a recovery. *Jee v. Thurlow* (1824, K. B.) 2 B. & C. 547; *Sweet v. Sweet* [1895] 1 Q. B. 12. The New Jersey court gives two reasons for holding the New Jersey law to be different from the English law. One is that in England agreements of this kind are prepared by skilled solicitors who embody *dum casta* clauses in the agreements, so that omission of a clause of that kind may well be held to signify that the husband agrees to pay even though the wife misconduct herself. The other reason is that a separation agreement has under New Jersey law legal effects which differ in important respects from its effects under English law. According to the latter the separation agreement is a contract with all the usual legal consequences. *Besant v. Wood* (1878) 12 Ch. D. 605, and cases there cited. According to the New Jersey law, however, while such an agreement confers upon each of the parties a legal privilege to live apart from the other, thus putting an end to the previously existing legal duty to live with the other, it is, nevertheless, "revocable," *i. e.*, the legal privilege of each is subject to a legal power in the other to terminate the privilege by suitable notice and so to bring into existence again a duty to live with the other spouse. This rule apparently has been adopted in New Jersey on the ground that it is contrary to public policy to give to the separation agreement the consequences attached by English law. It follows that the agreement of the husband to make the stipulated weekly payments has legal effects comparable to those resulting from a continuing offer, revocable

at will; *i. e.*, it confers upon the wife a legal power to acquire, by continuing to live apart and to perform the other parts of the agreement as well as her duties growing out of her status as a married woman, a legal right to the payment for that week. There is, of course, a correlative liability on the part of the husband, so long as he does not revoke, to have the correlative duty to pay imposed upon him by the wife's so acting. However, as in the case of the offer, the power of the wife is subject to a power of revocation in the husband, *i. e.*, the husband may at any time by proper notice terminate it. There exists, therefore a correlative liability on the part of the wife to have her power destroyed by the husband; her power is not accompanied by an immunity from destruction, as it would be under the English law. Apparently most American courts assume that these separation agreements result in contractual obligations, if one may judge from the tenor of the opinions, but the point actually decided usually is merely that the wife may recover installments past due—a result also reached on the New Jersey theory. It should be noted that the decision reached in the principal case can quite as easily be arrived at by regarding the separation agreement as an irrevocable contract, on the ground that the resulting contractual obligation of the husband to make the payments is conditional upon the continued good conduct of the wife. Upon this ground the court in *Roth v. Roth* (1912, Co. Ct.) 138 N. Y. Supp. 573, on similar facts reached the same result as that in the principal case.

INSURANCE—RIGHTS OF BENEFICIARY—LIMITATIONS ON POWER TO CHANGE BENEFICIARY.—The defendant company issued an insurance policy upon the life of John Neary, whose wife, the present plaintiff, was named as beneficiary. The policy provided that the insured might change the beneficiary by written notice accompanied by the policy, the change to be effective upon indorsement thereof on the policy by the company. John Neary later sent written notice of a change to the company and the company assented and noted the change in its books. No indorsement was made on the policy because it was in the plaintiff's possession. The plaintiff paid all the premiums, including one after the attempted change, and at no time was informed of the change. *Held,* that no change had been effected and that the plaintiff was entitled to the insurance money. Wheeler, J., *dissenting. Neary v. Metropolitan Life Ins. Co.* (1918) 92 Conn. 488, 103 Atl. 661.

The majority opinion holds that the existing facts created a "legal interest" in the first beneficiary and not a "mere expectancy," even though the interest was "qualified" by the reserved power to change, and that there was no power to change except by proceeding as prescribed in the policy. If facts create nothing more than an "expectancy," they create nothing at all other than a state of mind. An "expectancy" involves no legal relations whatever. The term "legal interest," however, indicates that legal relations exist. In the absence of any reserved power in the insured, those legal relations seem to be as follows. The beneficiary has what is usually called a "conditional right" against the insurer, and the insured has no power (*i. e.* he has a disability) to terminate this right by any purely voluntary act of his own. The beneficiary has no active and instantly enforceable right against the insurer (except perhaps a right that the insurer shall not repudiate); but nevertheless the conditional right when accompanied by the disability is an interest that is much more than a mere "expectancy." In the principal case, however, there was no such disability. The insured having reserved the power to change, the beneficiary had a liability that her conditional right might be extinguished. Where the power to change is reserved the intention seems to be to make the beneficiary's future